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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1543

WILLIE JOHNSON, JR.,

Petitioner,

—v.—

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioner submits this Reply Brief in support of his petition for a Writ of Certiorari.

Respondents do not deny that the decision of the Sixth Circuit in the instant case that the filing of an EEOC charge does not toll the statute of limitations under § 1981 is squarely in conflict with the contrary holdings of the Fifth and District of Columbia Circuits in *Boudreaux* v. *Baton Rouge Marine Contracting Co.*, 437 F.2d 1011, 1017, n.15 (5th Cir. 1971), and *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 994-95, n.30 (D.C.Cir. 1973). Respondents suggest that this conflict is unimportant because the holdings in *Boudreaux* and *Macklin* were mere dicta. Brief of Respondent REA Express, Inc., pp. 7-8; Brief of Respondent Brotherhood of Railway Clerks, pp. 12-13. This is neither accurate nor relevant.

In *Macklin* the plaintiff alleged that jurisdiction over his employment discrimination claim was conferred by both Title VII and § 1981. The D.C. Circuit upheld the action on both grounds, and necessarily reached the tolling question because it controlled the date from which plaintiff was entitled to back pay. 478 F.2d 979, 994, n.30. In such a decision based on alternative grounds the court's holdings regarding § 1981 are plainly no more dicta than its decisions concerning Title VII. In *Boudreaux*, also an action under both Title VII and § 1981, the Fifth Circuit held that the filing of an EEOC charge tolled the statute of limitations, and that the plaintiff therefore had a cause of action. The Court of Appeals also held the plaintiff could establish a Title VII claim on remand if he proved certain facts. 437 F.2d 1014-16. The decision on § 1981 was sufficient to establish jurisdiction, and on remand the case proceeded as a § 1981 action without any inquiry regarding the facts needed to establish a Title VII action.

Regardless of whether the holdings in *Macklin* and *Boudreaux* are characterized as "dicta", it is undisputed that those decisions establish the rule of law to be applied in the District of Columbia and Fifth Circuits respectively. On April 29, 1974, five months after the Sixth Circuit decision in the instant case, the Fifth Circuit rejected the rule adopted below and reaffirmed its decision that the filing of an EEOC charge tolls the statute of limitations for § 1981. *Pettway* v. *American Cast Iron Pipe Co.*, 7 EPD ¶ 9291, p. 7369, n. 130. The rule of *Boudreaux* and *Macklin* is of course being followed by the district courts in the Fifth Circuit. See *Henderson* v. *First National Bank of Montgomery*, 344 F. Supp. 1373 (M.D. Ala. 1972). When such an inescapable conflict exists among the circuits, certiorari should be granted so that this Court can resolve the matter.

Respondent REA Express urges, in the alternative, that plaintiffs' complaint was properly dismissed because no employee subject to the Railway Labor Act can sue § 1981 without first exhausting certain administrative remedies under the Railway Labor Act. Brief of Respondent REA Express, pp. 12-15. In *Glover* v. *St. Louis-San Francisco R. Co.*, 393 U.S. 324 (1969), this Court held that an employee need not exhaust his administrative remedies under the Railway Labor Act prior to commencing a civil action where resort to such remedies would be futile since those to whom the grievance must be submitted would be chosen by the defendants against whom the complaint was made. 393 U.S. at 330-31. In the instant case the complaint alleges, as did the complaint in *Glover*, that both the union and the employer are involved in the discriminatory practices complained of. Respondent suggests that *Glover* was overruled or limited by this Court's recent decision in *Andrews* v. *Louisville & Nashville R. Co.*, 406 U.S. 320 (1972). *Andrews*, however, involved a dispute as to the interpretation of a collective bargaining agreement and the plaintiff's grievance was solely with the employer, not his union, and is clearly distinguishable from both *Glover* and the instant case.

The Respondent Union suggests that plaintiff is bound because he did not appeal from two interim decisions of the District Court. Brief of Respondent Brotherhood of Railway Clerks, pp. 8-13. First the union urges that plaintiff was obligated to appeal from the order of February 16, 1972, dismissing without prejudice his first complaint. The basis for that dismissal, however, was that plaintiff was unable to pursue his district court action for want of counsel. Obviously the same lack of counsel which prevented plaintiff from litigating in the district court made it impossible for him to appeal anything in February 1972. In the

alternative, the Union urges that plaintiff was obligated to appeal from the District Court's decision of June 14, 1971, granting judgment for the union on all claims and for the employer on some, but continuing the litigation as to the remaining claims against the employer. The union suggests that any order denying relief against one or more defendants on one or more equitable claims in a Title VII action is immediately final and appealable, and must be appealed at once. Virtually all Title VII cases involve interim decisions in the district court, prior to completion of all litigation at the trial level, granting or denying partial relief or dismissing particular claims or defendants. Utter havoc would be wreaked by a rule such as that advanced by the union requiring that, upon the entry of each of these interim orders, all district court proceedings had to grind to a halt pending an interlocutory appeal. Since no appeal of the February 16, 1972, decision was possible, and no interlocutory appeal of the June 14, 1971 decision was appropriate, the doctrine of *res judicata* cannot be interposed to prevent the litigation on appeal of those decisions in the instant case.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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